INDEX.

Index to Petition for Writ.

	PAGE
I. Summary and short statement of the matter involved	1
II. Basis upon which it is contended that this Court has jurisdiction	5
III. Questions presented	6
IV. Reasons relied upon for allowance of writ	6
Prayer	6

Reference to Judicial Code.

Sec. 240 of the Judicial Code (Title 28, Sec. 347, U. S. C. A.)	5

Index to Brief.

I. Opinions of the courts below	8
II. Jurisdiction of this Court	8
III. Statement of the case	8
IV. Specification of errors	8
V. Argument	9
Point 1: The rule against perpetuities	9
Point 2: The writ of certiorari should be granted	17

Reference to Oklahoma Constitution and Statutes.

Sec. 2, Art. 32, Constitution of Oklahoma	10
Secs. 31, 34 and 172, Title 60, 1941 Okla. Stats. Ann.	10

Cases Cited.

Adams v. Dugan, ... Okl. ...., 163 P. (2d) 227	9, 14, 16
American National Bank of Enid v. Crews, 191 Okl. 53, 126 P. (2d) 733	18

PAGE

Hoehn v. Crews, 144 F. (2d) 665, cert. den. 323 U. S. 817 ..... 2, 18

Erie R. Co. v. Tompkins, 304 U. S. 64 16

Cunningham v. Fidelity National Bank of Oklahoma City, 186 Okl. 429, 99 P. (2d) 57 16

Hartford Ins. Co. v. Chicago, etc., Ry., 175 U. S. 91, 100 17

In re Street's Estate, 133 Okl. 115, 280 Pac. 413 ..10, 13, 17

In re Walker's Estate, 179 Okl. 407, 66 P. (2d) 88, 95 .. 9-10

McLaughlin v. Yingling, 90 Okl. 159, 213 Pac. 552 ..10, 11, 17

SUPREME COURT OF THE UNITED STATES.

October Term, 1946.

No. _____

Ralph Crews; Charley Crews; Robert Crews; Everett Crews; Amy Tresner, *nee* Crews; and Mary Willis, *nee* Crews, *Petitioners,*

vs.

D. J. Oven; and A. D. N. Champlin; Helen Champlin Oven and Joe Noble Champlin, as Executors under the Will of H. H. Champlin, Deceased; A. D. N. Champlin; Doyle W. Cotton; Helen Elizabeth Cotton; Doyle W. Cotton, Jr.; Doyle W. Cotton as Trustee under the Will of H. H. Champlin, Deceased, of the Estates of Helen Elizabeth Cotton and Doyle W. Cotton, Jr.; Helen Champlin Oven; David Jerald Oven; Herbert Hiram Oven; Joan Oven; Helen Champlin Oven, as Trustee under the Will of H. H. Champlin, Deceased, of the Estates of David Jerald Oven, Herbert Hiram Oven and Joan Oven; Joe Noble Champlin; Joanna Champlin, Herbert Hiram Champlin III; Douglas Lloyd Champlin; Joe Noble Champlin, as Trustee under the Will of H. H. Champlin, Deceased, of the Estates of Joanna Champlin, Herbert Hiram Champlin III, Douglas Champlin and of the children, if any, hereafter born to Joe Noble Champlin and Jane Edwards Champlin, *Respondents.*

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

Your petitioners respectfully show:

I.

Summary and Short Statement of the Matter Involved.

This case began in the United States District Court for the Western District of Oklahoma, and is a part of the

aftermath of *Hoehn* v. *Crews,* 144 F. (2d) 665, *certiorari* denied, *Hoehn* v. *Crews,* 323 U. S. 817. In that case these petitioners obtained various judgments, aggregating more than $50,000.00 against D. J. Oven (R. 13, 14). After execution on such judgments was returned wholly unsatisfied (R. 14), these petitioners brought the present action, in the nature of a creditor's bill, against D. J. Oven and the executors, devisees and beneficiaries under the will of H. H. Champlin, deceased, respondents above named, to reach and apply the distributive share to which D. J. Oven as an heir of Claire Marie Oven, deceased, inherited from her—she being one of the devisees under the Champlin will and who died after that will was admitted to probate and prior to the bringing of the present action. A decree was rendered in favor of respondents dismissing the petition (R. 32). An appeal was taken by the petitioners to the United States Circuit Court of Appeals for the Tenth Circuit and the decree of the trial court was affirmed. The case hinges on the construction of the will of H. H. Champlin, deceased, and the following statement (taken from the agreed statement of facts, R. 13 to 17) shows the matter involved:

The will is set out in full at page 59 of the record. After provision for payment of debts, provision for establishment of a memorial, and the bequest of household and personal effects to his wife—to the fulfillment of which the bulk of the estate was not necessary—the substance of the will, material here, is:

> "*Fifth.* • • • All the remainder of my property, both real and personal, I give, bequeath and devise,

subject to the contingencies set forth in Article 'Third'*, as follows:

• • • • • • • •

"To my granddaughter, Claire Marie Oven, I give, bequeath and devise, in kind, six and sixty-six hundredths plus (6.66+) interest.

"*Sixth.* For the purpose of taking title to and administering that portion of my estate herein devised to my • • • granddaughter, Claire Marie Oven, and • • • all minors, I hereby create a trust, effective immediately upon my demise, subject to proceedings made and provided for in the Probate Court of Garfield County in such instances, and hereby appoint and designate their mother Helen Champlin Oven, their trustee, without bond, and in the event of her death, or inability to serve, I then appoint and designate the First National Bank of Enid as successor in trust, without bond.

"Said trustees to take and have full control and management, to vote stocks, to collect dividends and interests, to sell, buy and invest or reinvest funds, to pay taxes and all just claims against said trust estate and in fact do all that a natural person and owner might do under similar circumstances, not inconsistent with this instrument, or the laws made and provided to govern matters of this kind.

"As the beneficiaries of the above created trusts arrive at the age of thirty-five (35) years, and not before, I then direct that his or her portion of his or her trust with accumulations, be transferred to he or she by appropriate and legal instruments of transfer and conveyance. Should any of the beneficiaries of any of the above created trusts die, before having received his or her portion, leaving lineal descendants, then I

*Article "Third" gave the executors authority, on their unanimous election and approval, to devote approximately $500,000.00 or $600,000.00 to the establishment of a memorial dedicated to two deceased children. (R. 60)

further direct that these trusteeships continue until such lineal descendants arrive at the age of thirty-five (35) years.

"*Seventh.* In the event any of the devisees of this die, before having received their portion of my property, then I direct that his or her portion pass as *per stirpes* to his or her lineal descendants. In no event shall a husband or wife living apart, separated or divorced from any of my devisees, inherit or take any part of my estate."

H. H. Champlin, the testator, died April 30, 1944, and the above will was admitted to probate and executors were appointed and qualified in the County Court of Garfield County, Oklahoma, on June 15, 1944, whereupon the executors took possession of all the estate of H. H. Champlin, deceased, and are now possessed of same; that the estate has not yet been distributed and no order of distribution has been made therein (R. 12). Thereafter, on July 5, 1944, Claire Marie Oven, named and specified in the fifth section of above will, died intestate, never having been married and without issue, and left surviving her as her sole and only heirs Helen Champlin Oven and the respondent D. J. Oven, her mother and father respectively (R. 13).

Claire Marie Oven, deceased, had no debts at the time of her death and no administrator has been appointed for her estate and no administration of her estate will be necessary; and upon distribution of the estate of H. H. Champlin, deceased, whatever part thereof, if any, under the hereinbefore mentioned circumstances was inherited by the respondent D. J. Oven from Claire Marie Oven, deceased, will be available for distribution unto him the said D. J. Oven (R. 13).

The estate consists of both real and personal property and is very substantial in amount and value, and if the bequest and devise to Claire Marie Oven was a vested estate in her, then the inheritance of the respondent D. J. Oven in the share of Claire Marie Oven, deceased, in the estate of H. H. Champlin, deceased, will be in excess of the amount of the petitioners' judgments against respondent D. J. Oven (R. 12).

Petitioners contend that the bequest and devise to Claire Marie Oven was a vested estate in her; whereas, respondents contend and the two courts below held that by reason of the trust provisions of the will the estate bequeathed and devised to Claire Marie Oven was dependent upon the trust provisions of the will and was, therefore, contingent. Petitioners contend that to give the trust provisions of the will such construction, so given by the court below, violates the rule against perpetuities; that, therefore, the trust provisions, being in violation of the rule against perpetuities, are void and thus leaves a vested estate in Claire Marie Oven.

II.

Basis Upon Which It Is Contended That This Court Has Jurisdiction.

(1) This petition for *certiorari* is prosecuted pursuant to the provisions of Sec. 240 of the Judicial Code as amended (Title 28, Sec. 347, U. S. C. A.), to review a decision and judgment of the United States Circuit Court of Appeals for the Tenth Circuit, rendered in a Civil case.

(2) The opinion (R. 87) and judgment (R. 91) of the Circuit Court of Appeals sought to be reviewed were filed on January 27, 1947. Petition for rehearing was filed Feb-

ruary 27, 1947, (R. 93) and the court entered an order denying such petition on March 27, 1947. (R. 113).

III.

Questions Presented.

The questions presented by this petition are:

(1) Whether the trust provisions of the will of H. H. Champlin, deceased, are in violation of the rule against perpetuities, *ergo,* the estate bequeathed and devised to Claire Marie Oven under such will was a vested estate in her.

(2) Whether this court should grant *certiorari.*

IV.

Reasons Relied Upon for Allowance of Writ.

We think there are "special and important reasons" for allowance of the writ. These are:

Because there is involved an important question of Oklahoma law, which is determined by the Constitution of Oklahoma, and by the statutes of Oklahoma, and which question has been passed upon and determined by the decisions of the Supreme Court of the State of Oklahoma—the highest court in Oklahoma—and the decision of the Circuit Court of Appeals is contrary to and in direct conflict with controlling decisions by the Supreme Court of the State of Oklahoma deciding such question.

Wherefore, your petitioners pray that this court issue a writ of *certiorari* to the United States Circuit Court of Appeals for the Tenth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said

United States Circuit Court of Appeals for the Tenth Circuit had in case numbered and entitled in its docket, No. 3342, *Ralph Crews, et al., Appellants,* v. *D. J. Oven, et al., Appellees,* to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States and that the judgment and decree herein of the said Circuit Court of Appeals for the Tenth Circuit may be reversed by this court and for such further or other relief as to this court may seem proper.

Respectfully submitted,

CHRISTY RUSSELL,
Mattoon, Illinois,
Counsel for Petitioners.

M. F. PRIEBE,
Enid, Oklahoma,
Of Counsel.

There is filed herewith a certified transcript of the record in the case, as printed below, including the proceedings and opinion in the United States Circuit Court of Appeals for the Tenth Circuit—ten (10) copies thereof being filed in conformity with Rule 38.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The trial court rendered two written opinions, neither of which is reported, but both are in the record. The first opinion is found at page 17, under the heading "Tentative Conclusions of Law." The second opinion is found at page 31, under the heading "Findings of Fact and Conclusions of Law."

The opinion of the Circuit Court of Appeals (R. 87) is not yet reported.

II.

Jurisdiction of This Court.

The grounds of jurisdiction were stated under Section II of the petition for writ of *certiorari*.

III.

Statement of the Case.

This has been fully covered under Section I in the petition for writ of *certiorari* and, in the interest of brevity, is not repeated here.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in sustaining the judgment and decree of the trial court.

2. The Circuit Court of Appeals erred in holding that the bequest and devise to Claire Marie Oven, under the will of H. H. Champlin, deceased, was contingent.

3. The Circuit Court of Appeals erred in refusing to hold that the bequest and devise to Claire Marie Oven,

under the will of H. H. Champlin, deceased, created a vested estate in Claire Marie Oven.

4. The Circuit Court of Appeals erred in refusing to hold that the trust provisions of the will of H. H. Champlin, deceased, are in violation of the rule against perpetuities, and that the trust provisions of the will are void.

5. The Circuit Court of Appeals erred in holding that the principles announced in *Adams* v. *Dugan*, ... Okl. ..., 163 P. (2d) 227, are applicable in this case.

6. The Circuit Court of Appeals erred in not reversing the trial court and directing the trial court to enter a decree for petitioner.

V.

ARGUMENT.

The argument will be presented under two headings:

Point 1. The rule against perpetuities;

Point 2. The writ of *certiorari* should be granted.

Point 1.

The Rule Against Perpetuities.

"The rule against perpetuities is: That executory limitations are void unless they take effect, of necessity, and in all possible contingencies, within the period of a life or lives in being at the death of the testator, and twenty-one years thereafter. An estate to vest in the future, which may possibly not vest until after the expiration of a life or lives in being, plus twenty-one years, could not validly exist, and an instrument attempting such purpose would be invalid, for it would be in violation of the rule. Sections 11759, 11756,

O. S. 1931 (60 Okla. St. Ann., Sec. 34, 31). *Phillips* v. *Chambers*, 174 Okl. 407, 51 Pac. (2d) 303."

—*In re Walker's Estate*, 179 Okl. 407, 66 P. (2d) 88, 95.

In Oklahoma, the *rule against perpetuities* is regarded as of great importance. Thus, the first positive mandate of the Oklahoma law is found in Section 32, Article 2, of the Constitution of Oklahoma, which provides that, "Perpetuities * * * are contrary to the genius of a free government, and shall never be allowed."

In Oklahoma, the *rule against perpetuities* is found in the sections of the 1941 Okla. Stats. Ann., set out in the foot note below.*

These sections were Sections 8410, 8413 and 8466, respectively, Comp. Stats. 1921, and were construed by the Supreme Court of Oklahoma in *McLaughlin* v. *Yingling*, 90 Okl. 159, 213 Pac. 552, and *In re Street's Estate*, 138 Okl. 115, 280 Pac. 413.

---

*Title 60, Sec. 31: "The absolute power of alienation cannot be suspended by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons, in being at the creation of the limitation or condition, except as provided in Section 6608."

Title 60, Sec. 34: "A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain majority."

Title 60, Sec. 172: "No such express trust shall be valid unless created, *first*, by a written instrument subscribed by the grantor or grantors duly acknowledged, as conveyances of real estate are acknowledged, and recorded in the office of the county clerk of each county wherein is situated any real estate conveyed to such trustee, as well as in the county where the principal property is located or business conducted; or, *second*, by a will duly executed, as required by the law of the state. Such express trusts shall be limited in the duration thereof either to a definite period of not to exceed twenty-one (21) years, or to the period of the life or lives of the beneficiary or beneficiaries thereof. The instrument creating the trust shall specify the period of duration thereof within the limitations herein provided."

Because the rule is stated so concisely, and the illustrations given so exactly fit the present case, we quote liberally from *McLaughlin* v. *Yingling, supra,* wherein the Supreme Court of Oklahoma (p. 563 of 213 Pac.) approvingly stated:

"In a note to *Thomas* v. *Thomas,* 75 Am. St. Rep. 431, 432, the rule is thus stated:

"'In order that a vested share, which is not to come into possession until a future time, shall escape the consequences of the rule against perpetuities, the vesting must be indefeasible. * * * In enforcing the rule against perpetuities it is a firmly established principle that every future limitation of an estate is void as too remote unless it is apparent that it must take effect and vest, if at all, within the period allowed by the rule. The test therefore by which to ascertain whether a limitation over is void for remoteness is very simple. It does not depend on the character or nature of the contingency or event on which it is to take effect, for these may be varied to any extent. But it turns on the single question whether the prescribed contingency or event may not arise until after the time allowed by law within which the gift over must take effect. Thus where a breach of condition on which a limitation depends, if it occurs at all, must occur within the period allowed by the rule, it will be upheld. It is not sufficient that the future estate may by possibility become vested within the period allowed by the rule against perpetuities, or even that it will probably become vested in such period. If it may possibly happen beyond the established time limits or if there is left any room for uncertainty or doubt on the point the limitation is void. If a future limitation may not by possibility take effect within the prescribed period it cannot be made good by subsequent events. In other words, the validity of the future estates under the rule against perpetuities depends, not on what actually hap-

pens after the time at which the rights of the parties are fixed, but on what may happen as viewed at the time when the deed or will creating them takes effect. Thus, it makes no difference that one to whom a future interest is given happens to be born within the period allowed by the rule if he might have been born beyond that period.' 21 R. C. L., pp. 289, 290.

"'Apart from a resort to lives in being as the standard for measuring the period of time for the postponement of the vesting of a future estate, the only definite period permitted by the rule against perpetuities is a term not exceeding 21 years. This term of 21 years is not dependent on the existence of the minority of any person, but is a period in gross, and a testator may properly postpone the vesting of a future interest created by his will for a period of time not exceeding 21 years in addition to a life or lives in being; but he must not exceed this limitation, and a provision that 30 years after the testator's death an estate is to be given to his nephews and nieces, or their heirs, and, if not heirs, to be divided equally among the surviving heirs, would be void. Similarly it has been decided that a bequest in trust for the benefit of testator's daughter during life, and to distribute the remainder among her children when the youngest reaches the age of 30 years, violates the rule against perpetuities, because there is a possibility of the distribution being delayed more than 21 years after the death of the daughter. For the same reason a gift which is made to all the testator's grandchildren, including those who may be born after his death, to take effect 10 years from the time when the youngest grandchild shall have become of age, violates the rule.' 21 R. C. L., p. 293.

"'The rule against perpetuities is not a rule of construction, but a positive mandate of law, to be obeyed irrespective of the question of intention. The proper procedure is to determine the true construction of the will or deed involved, just as if there was no such thing

in existence as the rule against perpetuities, and then to apply the rule rigorously, in complete disregard of the wishes and intentions of the testator or grantor. It has been said that the rule against perpetuities, like the rule in *Shelley's* case, always defeats the testamentary intention, and that the court is free to disregard such provisions of the will as violate it, although to do so violates the testator's intention as determined by the court.' 21 R. C. L., pp. 294, 295."

Looking, now, to the provisions of subdivision Sixth of the Champlin will, in the instant case, whereby the trust was to continue until Claire Marie Oven reached the age of thirty-five years and in the event she die before reaching that age "leaving lineal descendants, then I further direct that these trusteeships continue until such lineal descendants arrive at the age of thirty-five (35) years."

Suppose, now, by way of illustration, that Claire Marie Oven had died in childbirth and left surviving a lineal descendant born at the moment of her death. By the terms of the will, the trust, in such circumstances, would continue until such child arrived at the age of thirty-five years. Obviously, that shows an attempt to create a trust which may *possibly* continue for the life in being at the time of the death of Champlin and for thirty-five years thereafter.

If then, as held by the Circuit Court of Appeals in this case, the provisions creating the trust are such as to prevent vesting of the estate in the devisees until the termination of that trust, then, indubitably, sub-divisions Sixth of the Champlin will was and is void as being in violation of the rule against perpetuities. Eliminate the Sixth sub-division of the Champlin will, as it must be eliminated (*In re Street's Estate, supra*) and there is left the Fifth subdivision, which clearly and distinctly makes to Claire Marie

Oven an absolute "devise in kind, of six and sixty-six hundredths plus (6.66+) interest" in the estate of testator.

This court may, perhaps, be as surprised as we were disappointed* that no discussion of, or mention of, or reference to the above theory, or of the above cases, appears anywhere in the opinion of the Circuit Court of Appeals.

It cannot be urged that because this theory is not specifically discussed in the opinion of the Circuit Court of Appeals, that such opinion and decision does not pass upon and determine such question. The trust provisions of the will are quoted in the opinion and when the opinion holds that by reason of such trust provisions the estate devised to Claire Marie was not vested but was contingent, that necessarily sustains the validity of the trust provisions and does pass upon and determine the question. If the rule were otherwise, a review could always be precluded by simply not discussing or adverting to a particular theory, presented and urged below. And this theory was particularly and specifically presented. It was presented in our brief and in the oral argument, which are not a part of the record here, and it was again presented on page 16 of our petition for rehearing (R. 110).

After quotation from *Adams* v. *Dugan*, ... Okl. ...., 163 P. (2d) 227, ending the quotation (R. 90) by emphasis of the words *"be living at the end of the trust period"*— thus clearly disclosing that it was of the opinion that the devise and bequest to Claire Marie Oven was dependent on the trust—the Circuit Court of Appeals, then (R. 90) held that the principles announced in *Adams* v. *Dugan, supra,*

*Precisely the same statutes, the same cases, and substantially *verbatim* the identical argument we have above made herein, were presented and made in our principal brief in the Circuit Court of Appeals, and we adverted to this feature, again, on page 16 of our petition for rehearing in that court (R. 110).

"are applicable in the instant case" and that, under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, it was "compelled to hold that the interest of Claire Marie was contingent."

Very briefly and concisely, *the trust in that case was to continue for the life of testator's widow and for eleven years thereafter.* The beneficiaries of the trust property remaining at the end of such eleven-year period, were dependent on various contingencies set forth in the opinion of the Oklahoma Court, some of which contingencies are recited (R. 89, 90) in the opinion in the instant case. *Adams* v. *Dugan, supra,* presents the question of a future estate and whether such future estate was vested or contingent, then the incidental question of whether such future estate, if contingent, was subject to be taken under the levy of an execution on a farm which was a part of the trust estate, such execution being based on a judgment against one whose interest was wholly contingent. *Adams* v. *Dugan, supra,* does not present any feature of the rule against perpetuities, and there is no suggestion or intimation therein in anywise pertaining to perpetuities.

Adams v. *Dugan, supra,* did not present the *validity* of the future estate, but presented only the *nature* of the future estate; whereas, the instant case presents the validity of the future estate rather than the nature of the future estate.

We cannot, within the permissible limits of this brief, further review that case. Nor is it necessary, since the reported case is readily available to this court. With no purpose of being facetious, and with the single purpose that we may arrest the attention of this court and cause it to examine that case,—we do say, that the principles presented, considered and decided by the Supreme Court of Okla-

homa in *Adams* v. *Dugan, supra,* have no more similarity to the principles presented and decided in the present case, than an opinion by the Supreme Court of Oklahoma involving the simple questions arising in an ordinary action for the replevin of a sow and pigs.

After holding that the principles announced in *Adams* v. *Dugan, supra,* controlled the decision in the instant case, the Circuit Court of Appeals then said (R. 90): "But were we free to exercise an independent judgment, we would reach the same result." The opinion then continues (R. 90), in substance, that in construing a will, the intention of the testator governs and that the will discloses an intention that the trust estate should pass to his lineal descendants and only to them. That reasoning, we submit, is forgetful of the rule applied in *In re Street's Estate, supra,* and announced, again, by the Supreme Court of Oklahoma in *Cunningham* v. *Fidelity Nat. Bank of Oklahoma City,* 186 Okl. 429, 99 P. (2d) 57, wherein the first head-note is:

> "The cardinal rule for the construction of wills is to ascertain the testator's intent, and to give effect thereto *if the intent does not attempt to effect that which the law forbids.*" (Emphasis ours.)

We submit, therefore, that the Circuit Court of Appeals erred when referring to *Adams* v. *Dugan, supra,* it held (R. 90):

> "We are of the opinion that the principles announced in that case are applicable in the instant case. It follows that under the doctrine of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, we are compelled to hold that the interest of Claire Marie was contingent."

The doctrine of *Erie R. Co.* v. *Tompkins, supra,* is applicable in the present case, but it compels the holding

that under the principles of *McLaughlin* v. *Yingling, supra,* and *In re Street's Estate, supra,* the trust provisions of the will are void and that the devise and bequest to Claire Marie Oven created a vested estate in her.*

Point 2.

The Writ of *Certiorari* Should Be Granted.

If, in the determination of whether "special and important reasons" exist which warrant the granting of a writ of *certorari,* a distinction can be made as between provisions of local law which are ordained for the safeguard of private rights, as distinguished from those provisions of local law which are ordained for the safeguard of public rights and it be held that the writ will be granted only when provisions are involved which are ordained for the safeguard of public rights, then the present case does present the requisite important and special reasons warranting the granting of the writ.

The *public policy* of a state is found in its constitution and in its statutes as construed by the decisions of its highest court. (*Hartford Ins. Co.* v. *Chicago, etc., Ry.,* 175 U. S. 91, 100.)

By its Constitution, *supra,* Oklahoma ordained by positive mandate, and for what it deemed to be for the good of all the people, that, "Perpetuities * * * are contrary to the genius of a free government, and shall never be allowed." And, Oklahoma did not then remain silent, but it enacted

*It is not necessary to elaborately present here the question of whether Oven's share of the legacy to Claire Marie Oven can be reached by a creditor's bill, such as here—a question which the Circuit Court of Appeals, in the concluding paragraph of its opinion, held it unnecessary to decide (R. 90). That question is affirmatively decided in favor of petitioners in the decision of the trial court. (Conclusion of Law A and supporting foot-notes a, b and c; R. 17 and 18.)

specific statutes, heretofore quoted, vitalizing such constitutional provision, and the Supreme Court of Oklahoma has faithfully enforced such inhibition in every case in which it has had occasion to consider the matter.

We submit, therefore, that under the doctrine of *Erie R. Co.* v. *Tompkins, supra,* and under the fifth subdivision of Rule 38, of the rules of this court, that the writ should be granted.

Conclusion.

With more certainty that we are right than we ever before were in making an assertion as to the law, decisive of an important lawsuit, we assert that the trust provisions of the Champlin will, as construed by the Circuit Court of Appeals in this case, violate the rule against perpetuities; that the Champlin will creates a vested estate in Claire Marie Oven; and that this case presents the "special and important reasons" which render it not only the duty, but the pleasure, of this court to grant a writ of *certiorari* herein.

Our unshakable faith in the righteousness of our cause, we venture to hope is founded upon something more than the zeal which might well be natural at the culmination of about two decades in one lawsuit.* It could not be supposed and is not supposed, that such zeal would permeate here; though, if, as we believe, our convictions are well founded, it is not too much to hope that here the principles we have

---

*American National Bank of Enid v. Crews, 191 Okl. 53, 126 P. (2d) 733, from which stems Hoehn, et al., v. Crews, 144 F. (2d) 665, *certiorari* denied 323 U. S. 817, from which the present case stems.

presented will be recognized and enforced and not regarded as a mere flickering flame.

Respectfully submitted,

CHRISTY RUSSELL,
Mattoon, Illinois,
Counsel for Petitioners.

M. F. PRIEBE,
Enid, Oklahoma,
Of Counsel.

INDEX.

	PAGE
Objection to jurisdiction	1
Argument	5
Appendix "A"—Quotations from petitioners' brief in the United States Circuit Court of Appeals	13

CASES CITED.

Adams v. Dugan, 196 Okl. 156, 163 P. (2d) 227	2, 4, 8, 9-13
Dean v. Anson, 128 Okl. 23, 261 Pac. 174	6
Duignan v. United States, 274 U. S. 200	5
Guslin v. Marshall, 156 Okl. 173, 10 P. (2d) 250	6
Hunt v. Van Siclen, 136 Okl. 69, 276 Pac. 182	6
Lemmon Co. v. Oppenheimer, 155 Okl. 209, 8 P. (2d) 679	6
McLaughlin v. Yingling, 90 Okl. 159, 213 Pac. 552	4
Muskogee Electric Traction Co. v. Dunham, 129 Okl. 70, 263 Pac. 1091	6
Street's Estate, In re, 138 Okl. 115, 280 Pac. 413	4, 7
Walker's Estate, In re, 179 Okl. 442, 66 P. (2d) 88	4, 7

SUPREME COURT OF THE UNITED STATES.

October Term, 1946.

No. 1308

Ralph Crews; Charley Crews; Robert Crews; Everett Crews; Amy Treaner, *nee* Crews; and Mary Willis, *nee* Crews, *Petitioners,*

vs.

D. J. Oven; and A. D. N. Champlin; Helen Champlin Oven and Joe Noble Champlin, as Executors under the Will of H. H. Champlin, Deceased; A. D. N. Champlin; Doyle W. Cotton; Helen Elizabeth Cotton; Doyle W. Cotton, Jr.; Doyle W. Cotton as Trustee under the Will of H. H. Champlin, Deceased, of the Estates of Helen Elizabeth Cotton and Doyle W. Cotton, Jr.; Helen Champlin Oven; David Jerald Oven; Herbert Hiram Oven; Joan Oven; Helen Champlin Oven, as Trustee under the Will of H. H. Champlin, Deceased, of the Estates of David Jerald Oven, Herbert Hiram Oven and Joan Oven; Joe Noble Champlin; Joanna Champlin, Herbert Hiram Champlin III; Douglas Lloyd Champlin; Joe Noble Champlin, as Trustee under the Will of H. H. Champlin, Deceased, of the Estates of Joanna Champlin, Herbert Hiram Champlin III, Douglas Champlin and of the children, if any, hereafter born to Joe Noble Champlin and Jane Edwards Champlin, *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR *CERTIORARI* AND OBJECTION TO JURISDICTION.

Come Now, The respondents in the above entitled cause, by Harry O. Glasser, Nathan Scarritt and E. S. Champlin, their counsel, and in conformity with the provisions of (3) of Rule 38, respectfully enter objection to the

jurisdiction of the Court to grant *certiorari* in this cause and in support of such objections file the following brief in opposition to said petition:

That petitioners have wholly failed to state, or to attempt to state a Federal question.

The petitioners, in an effort to establish jurisdiction in this Court, assert that the Circuit Court of Appeals for the Tenth Circuit has decided a question of local law in conflict with applicable local decisions. On the contrary, however, the record shows that both the trial court and the Circuit Court of Appeals fully recognized their duty to follow the local law and that in seeking to do so, they did in fact apply the Oklahoma contingent remainder rule as expressed in *Adams* v. *Dugan*, 196 Okl. 156, 163 P. (2d) 227, which both courts agreed is the controlling Oklahoma decision on the subject.

Under III, on page 6 of the petition, petitioners say:

"The questions presented by this petition are:

"(1) Whether the trust provisions of the will of H. H. Champlin, deceased, are in violation of the rule against perpetuities (therefore) the estate bequeathed and devised to Claire Marie Oven under such will was a vested estate in her.

"(2) * * * * * * *"

In stating the above as the sole ground for review, the petitioners have completely reversed the position which they asserted in the Circuit Court of Appeals.

In that court, the petitioners took the position that if the bequest to Claire Marie Oven was dependent upon the trust, the entire bequest to her would be void under the rule against perpetuities.

This position is plainly stated by the petitioners in their brief in the Circuit Court of Appeals at page 43 thereof, quoted *infra*.

In contrast, the petitioners now take the position that the trust provisions offend the "rule against perpetuities" so as to void such trust provisions impressed upon the bequest to Claire Marie Oven, but that such bequest (paragraph 5 of the will) now stands alone and is perfectly valid.

This change in position is the departure of which we complain.

It is, they say, under IV, page 6 of the petition, that there are "special and important reasons" for the allowance of the writ, which are not identified or otherwise noted other than as follows:

> "Because there is an important question of Oklahoma law,[1] which is determined by the Constitution of Oklahoma[2] and by the Statutes of Oklahoma[3] and which question[4] has been passed upon and determined by the decisions[5] of the Supreme Court of the State of Oklahoma * * * and the decision of the Circuit Court of Appeals is contrary to and in direct conflict with controlling decisions[6] by the Supreme Court of the State of Oklahoma deciding such question.[7]"

1. Whether as to perpetuities, which was not invoked in the Circuit Court of Appeals, or as to contingent remainders, upon which the case was tried, argued, submitted and decided, counsel do not say.
2. The provisions in mind are not identified.
3. Which are also unidentified.
4. The same uncertainty as to whether perpetuities or remainders are in counsel's mind.
5. Unidentified by citation or as to subject matter.
6. Unidentified by citation or as to subject matter.
7. What question? Certainly not the question as to whether the trust provisions of the will of H. H. Champlin with regard to the remote contingent bequests to great grandchildren in the event there be any such whose birth would occur under circumstances such as recited

The Circuit Court of Appeals concluded that the devise to Claire Marie Oven was dependent upon the trust; and therein lies the petitioners' difficulty which now prompts a direct attack upon the provisions of the trust itself.

Counsel's mere admonition as to the rule against perpetuities did not invoke the rule, and for the obvious reason that if the trust provisions which necessarily involve the distribution of the estate are void as offending the "rule against perpetuities," there would be no comfort in such situation for the petitioners, for certainly Claire Marie Oven, a granddaughter, is not an heir of H. H. Champlin under the laws of descent and distribution of the State of Oklahoma.

---

in paragraph 3, page 13, of the petition for *certiorari*, would offend the "rule against perpetuities," for if these remote contingent trusts to such great grandchildren so born be challenged as offending the "rule against perpetuities," the settled law of Oklahoma would require a court to do one of two things, neither of which would vest title in Claire Marie Oven. The court would be compelled to hold either that, (1) these remote trusts constituted a necessary and integral part of the entire scheme of distribution and that the entire will was therefore void; or, (2) declare the remote contingent trusts as to the great grandchildren so born, void and preserve the remainder of the will.

See, McLaughlin v. Yingling, 90 Okl. 159, 213 Pac. 552;
In re Street's Estate, 138 Okl. 115, 280 Pac. 413;
In re Walker's Estate, 179 Okl. 442, 66 P. (2d) 88.

The latter would doubtless be the decision of an Oklahoma court, as such result is favored by the law of Oklahoma. It is apparent also that if such action should be taken, the trusteeships as to the grandchildren, including Claire Marie Oven, would be preserved, in which event the bequests to Claire Marie Oven, upon the authority of Adams v. Dugan, 196 Okl. 156, 163 P. (2d) 227, would still be contingent and her father, D. J. Oven, would inherit no part thereof, as was held by the Circuit Court of Appeals in the present action.

Upon the second contingency just stated, there can be no point in petitioners' favor, for if the trust provisions as to the contingency of unborn great grandchildren as recited in paragraph 3, page 13, of the petition for the writ, be void as offending the "rule against perpetuities," the issues in this case would in no wise be thereby affected. Claire Marie Oven did not leave any lineal issue. The rule in Adams v. Dugan, supra, would control and the decision here complained of would be sustained.

No stronger support for the correctness of this conclusion upon our part can be found than the admission at the top of page 43 of petitioners' brief in the United States Circuit Court of Appeals, wherein it was said:

> "* * * if the provisions of the will are such that the devise to Claire Marie *is dependent* on the trust then the devise *is void.* Claire Marie would not take as a contingent remainderman; she would not take at all."

Notwithstanding the foregoing admission and its implications, petitioners nevertheless confine their argument in the petition for the writ, to,

Point 1. The rule against perpetuities,

and,

Point 2. The writ of *certiorari* should be granted,

and our argument in opposition to the granting of the writ will therefore be likewise confined to these propositions.

ARGUMENT.

The interpretation of the "rule against perpetuities" is one of application of local law. However, the Circuit Court of Appeals did not pass upon that question—it was not urged—and for such failure upon petitioners' part to urge and for the court resultingly to fail to act thereon, that question and related matters are not before this Court.

See: *Duignan* v. *United States,* 274 U. S., p. 200, and cases there cited.

A litigant may not in Oklahoma prosecute his case or defense in the trial court upon one theory and lose, and

upon appeal be permitted to present another theory upon which to rely and prevail.

See: *Hunt* v. *Van Siclen*, 136 Okl. 69, 276 Pac. 182;
Muskogee Elec. Traction Co. v. *Dunham*, 129 Okl. 70, 263 Pac. 1091;
Dean v. *Anson*, 128 Okl. 23, 261 Pac. 174;
Lemmon Co. v. *Oppenheimer*, 155 Okl. 209, 8 P. (2d) 679;
Guslin v. *Marshall*, 156 Okl. 173, 10 P. (2d) 250.

The contention now urged by petitioners, as to the trust provisions of the will being void as offending the "rule against perpetuities" was not invoked, as we have heretofore said, in the Circuit Court of Appeals, nor presented to the trial court. All that was said in the petitioners' brief in the Circuit Court of Appeals is found at pages 41-43, incl., of their brief and is printed as Appendix "A" to this brief.

The substantial effect of the whole of such arguments is merely to continue to say,

(1) "that the devise to Claire Marie Oven was not dependent upon the trust,"

while contending that,

(2) "if the devise unto Claire Marie is dependent upon the trust"

such devise

"is void."

Petitioners are in error in both directions.

The trust provisions as to the bequest to Claire Marie, who died without lineal issue, are not void, and the devise is dependent upon the trust.

As against what the Circuit Court of Appeals found, in effect to be the clear intention of the testator, the petitioners now argue that all trust provisions of the will are invalid, leaving a naked unqualified bequest to each grandchild named in the will, of an interest in said estate.

Such construction would entail the immediate delivery of such bequests to each of such grandchildren.

The testator well understood that it would be most unwise to vest children of youthful age with substantial sums of money, or its equivalent, hence the trust provisions which are and were intended to be impressed upon the gifts.

The possibility that Claire Marie, if she had lived sixteen additional years, might have died in then giving birth to a lineal descendant and that the enjoyment of such bequest to such lineal decsendant child might trespass upon the "rule against perpetuities" would certainly be without bearing or importance upon the provisions of the trust impressed upon the bequest to Claire Marie Oven.

The most that can be argued under the law of interpretation in Oklahoma, which requires the approval of as much of the will as does not offend the rule against perpetuities (*In re Street's Estate,* 138 Okl. 115, 280 Pac. 413; *In re Walker's Estate,* 179 Okl. 442, 66 P. (2d) 88), would be that the provisions of the trust with relation to the devise over to *great grandchildren,* would be void.

Short of that, as the condition exists here, the will otherwise must have the approval of any court which surveys the question. Its preservation in every other respect is imperative and mandatory.

From these premises there is no escape and we are brought back sharply to the "sole question" in the case as stated by Judge PHILLIPS (p. 781, 159 F. (2d)), *viz:*

> "The sole issue presented is whether the bequest to Claire Marie was vested or contingent."

The application of the decision of the Oklahoma Supreme Court in *Adams* v. *Dugan, supra,* by the trial and Circuit Court of Appeals, as determining that question, is not now open to question.

Counsel having failed to secure in the Circuit Court of Appeals a favorable interpretation of the opinion of the Supreme Court of Oklahoma in *Adams* v. *Dugan,* 196 Okl. 156, 163 P. (2d) 227, *supra,* upon the contention that the,

> "devise to Claire Marie (Oven) is an absolute gift subject to be defeated by an executory gift over and that the absolute gift can be defeated only by the happening of the specified contingency * * *,"

become more than critical at pp. 15 and 16 in thier petition, and say,

> "* * * With no purpose of being facetious, and with the single purpose that we may arrest the attention of this court and cause it to examine that case—we do say, that the principles presented, considered and decided by the Supreme Court of Oklahoma in *Adams* v. *Dugan, supra,* have no more similarity to the principles presented and decided in the present case, than an opinion by the Supreme Court of Oklahoma involving the simple questions arising in an ordinary action for the replevin of a sow and pigs."

Four learned judges have unanimously agreed that the *Adams* v. *Dugan* case, *supra,* controls the determination of the question.

The lone dissenting opinion of Justice Hurst in the *Adams* v. *Dugan* case (p. 159) makes a better argument for petitioners' position than counsel for petitioners make.

We quote the material portions thereof as follows:

"The judgment is reversed, and the cause remanded, with directions to overrule defendant's demurrer to plaintiff's petition, and to proceed consistently with the views herein expressed.

"GIBSON, C. J., and OSBORN, BAYLESS, DAVISON, and ARNOLD, JJ., concur, HURST, V. C. J., dissents.

"HURST, V. C. J., (dissenting). The majority opinion is based upon the assumption that the interest of George Steedman in the lands levied upon is at most a contingent remaidner. I think it is a vested remainder.

"1. Our statutes do not define vested and contingent remainder, though they refer to them. 60 O. S. 1941, ch. 2. We must look, then, to the general law for the distinctions.

"In Black's Law Dictionary (3d. Ed.) a vested remainder is defined as one 'limited to a certain person at a certain time or upon the happening of a necessary event,' and a contingent remainder is defined as one 'limited to take effect to a dubious and uncertain person, or upon a dubious and uncertain event.' Similar definitions may be found in many cases and text books. See, 23 R. C. L. 497, 499; 33 Am. Jur. 525, 529; 21 C. J. 980, 981; 31 C. J. S. 88, 90. A vested remainder is an estate, while a contingent remainder is not an estate but is a mere possibility or prospect of an estate. Simes, Law of Future Interests in Land, Sec. 68; Tiffany, Real Property, (3d Ed.), Sec. 325; 23 R. C. L. 500; 33 Am. Jur. 527, 530; 21 C. J. 979, 984; 31 C. J. S. 88, 91.

"There are three classes of vested remainders, (a) those absolutely vested, (b) those subject to being partly divested by opening and letting in other remaindermen, and (c) those subject to being completely divested. Simes, Sec. 57; Restatement, Property, Sec. 157; Tiffany, Sec. 319.

"The remainder here is either a contingent re-

mainder or a vested remainder of the third class—one subject to complete defeasance. The difference between the two, broadly speaking, is stated in an annotation on the subject in 131 A. L. R. 712, as follows: 'If the condition on which the estate depends is precedent, the estate is contingent; if subsequent, it is vested, subject to defeasance.' To the same effect, see 23 R. C. L. 509, Sec. 43; 33 Am. Jur. 544, Sec. 88; Page on Wills, (2d. Ed.) Sec. 1116.

"In case of doubt the courts will, where possible, construe a remainder to be vested rather than contingent, and they favor a construction that will make the remainder vest at the earliest possible date. 21 C. J. 995; 31 C. J. S. 96; 23 R. C. L. 521; 33 Am. Jur. 558; Simes, Sec. 93; Gray, The Rule against Perpetuities (4th Ed.), Sec. 752.

"The interest of George Steedman in the lands fits the definition of a vested remainder and not that of a contingent remainder as stated by Black, above. The three remaindermen, children of testator, are 'certain persons.' The event which entitles them to come into possession of the estate is a 'necessary event.' Their mother is certain to die, and eleven years are certain to elapse after her death. It would seem, then, that the remainder interest should be considered vested unless the other provisions of the will clearly indicate that the testator intended it to be contingent. The fact that the remaindermen are expressly given the right to dispose of their interest, either by grant or will, so that the grantee or beneficiary under the remainderman's will would have an absolutely vested interest, thus rendering the other conditions inapplicable, is indicative of an intention on the part of the testator that interest of the three children shall be vested rather than contingent. I do not believe that any of the provisions establish an intention on the part of testator that the remainder interests be contingent.

"*a.* The will gives the trustee power to sell the property and to reinvest the proceeds and to hold the same subject to the terms of the trust. But, the rule seems to be universal that a remainder is not rendered contingent by a power given the life tenant, executor or trustee to dispose of the property either by grant or by will. Simes, Sec. 80; Tiffany, Sec. 319; Restatement, Property, Sec. 157, and comemnts under clause (c); 131 A. L. R. 712, at 715, annotation; 21 C. J. 981; 69 C. J. 625, Sec. 1717; 31 C. J. S. 90; 23 R. C. L. 511; 33 Am. Jur. 545.

"*b.* The intention of the testator that there shall not be a present vesting of the remainder in the three named children of testator is not shown by the fact that the will merely directs the trustee to 'pay over and deliver' the property to the children at the termination of the particular estate in the trustee, under the 'divide and pay over' rule, especially when other provisions, such as those giving the three children the right to dispose of their interests, are taken into consideration. *Koelliker* v. *Denkinger,* 148 Kan. 503, 83 P. (2d) 703, 119 A. L. R. 1; Restatement, Property, Sec. 260; 33 Am. Jur. 571; 69 C. J. 628, Sec. 1721. The courts favor holding an estate vested under the 'divide and pay over' rule where the remainder is given to named persons who are the natural objects of the bounty of testator, such as his children. 128 A. L. R. 309, annotation. And where the postponement of distribution is for the convenience of the estate so as to let in some other interest, or, as here, to pay an annuity to the life tenant, and not because of the incapacity of the remainderman, as in case of a spendthrift trust, it is said that the immediate vesting in the remaindermen is not prevented by the postponement under the 'divide and pay over' rule. 33 Am. Jur. 570; 69 C. J. 630.

"*c.* The present vesting in the three named children of testator is not prevented by the fact that, in the fifth paragraph of the will, it is provided that the in-

terest of any of the named remainderman, who may be deceased at the time the particular trust estate shall cease, shall go to his or her living issue, provided such remainderman shall not have sold or willed away his or her remainder interest, nor by the fact that if such remainderman shall die intestate, without issue and without having disposed of his or her remainder interest, and none of testator's children are then living, the share of such deceased remainderman shall go to the *then* heirs at law of the testator. These are conditions subsequent. 69 C. J. 632-637; Annotations, 109 A. L. R. 5 and 136, and 128 A. L. R. 306. However, the interest of the *issue* of the remainderman or the *then* heirs of the testator would probably be contingent.

"The direction to pay over and deliver the interests at the expiration of eleven years after the death of the widow to testator's 'then living children' refers to the possession and enjoyment of the property and does not mean that until that time the remainder interests of the three named children are contingent. This is another way of saying that if a remainderman has died prior to the time when the precedent trust estate shall cease, the interest of the deceased remainderman shall go in the manner directed in the will.

"*d.* The present vesting of the remainder interest is not prevented by the fact that the particular limited estate is vested in a trustee. The remainder interest does not vest in the trustee at all. See 23 R. C. L. 508, 529; 33 Am. Jur. 564; 65 C. J. 541. As to such remainder interest, the trustee simply holds a power in trust. 60 O. S. 1941, Secs. 190, 191; Simes, Sec. 252; 41 Am. Jur. 808.

"While authorities may be found to support any position that may be taken on some of the questions above mentioned, I think the view supported by the better and more recent authorities is that the interest of the three named children of testator is a vested remain-

der subject to complete defeasance by the happenings of conditions subsequent, such as sale of the property by the executor to pay the debts of testator, or sale by the trustee under the power given in the will, or death of a remainderman intestate and without issue and without having conveyed his interest. A careful study of the cases cited in the majority opinion convinces me that they do not support the conclusion reached.

"• • • • • • • •

It is obvious that the Oklahoma Supreme Court has adopted the rule upon the question of future estates, which was applied by the Circuit Court of Appeals in this case. Whatever difference in opinion may exist as to the propriety of the rule so adopted, does not present a question for consideration. The rule adopted in Oklahoma was correctly applied in this case by the Circuit Court of Appeals.

Wherefore, respondents respectfully pray that the petition for *certiorari* be denied.

HARRY O. GLASSER,
NATHAN SCARRITT,
E. S. CHAMPLIN,
Counsel for Respondents.

APPENDIX "A"

Quotations from petitioners' brief in the United States Circuit Court of Appeals, pp. 41-43, incl.:

"• • • • • • • •

"If it should be supposed that the trial court concluded that the devise to Claire Marie is dependent on the trust, then therein lies the error in the reasoning of the trial court. Because, if the devise unto Claire Marie is dependent on the trust, then it is certain that

a violation of the *rule against perpetuities* may possibly happen, and that, therefore, the devise of interests dependent on such provisions is void. In Oklahoma, the *rule against perpetuities* is found in the sections of the 1941 Okla. Stats. Ann., set out in the foot-note below.

"These sections were Sections 8410, 8413 and 8466, respectively, Comp. Stats. 1921, and were construed by the Supreme Court of Oklahoma in *McLaughlin* v. *Yingling*, 90 Okl. 159, 213 Pac. 552, and *In re Street's Estate*, 138 Okl. 115, 280 Pac. 413.

"In *Easton* v. *Hall*, 323 Ill. 397, 154 N. E. 216, is a full discussion of the rule against perpetuities. At page 408 of 327 Illinois, at page 219 of 154 N. E., the opinion says:

> 'The rule against perpetuities is: "That no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." Gray's Rule Against Perpetuities, Sec. 201. If the provisions of a will are such that under them a violation of

---

"Title 60, Sec. 31: 'The absolute power of alienation cannot be suspended by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition, except as provided in Section 6608.'

"Title 60, Sec. 34: 'A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain majority.'

"Title 60, Sec. 172: 'No such express trust shall be valid unless created, first, by a written instrument subscribed by the grantor or grantors duly acknowledged, as conveyances of real estate are acknowledged, and recorded in the office of the county clerk of each county wherein is situated any real estate conveyed to such trustee, as well as in the county where the principal property is located or business conducted; or, second, by a will duly executed, as required by the law of the state. Such express trusts shall be limited in the duration thereof either to a definite period of not to exceed twenty-one (21) years, or to the period of the life or lives of the beneficiary or beneficiaries thereof. The instrument creating the trust shall specify the period of duration thereof within the limitations herein provided'."

the rule against perpetuities may possibly happen, then the devise of interests dependent upon such provisions is void. The time fixed by this will for the distribution of the funds of the trust and its payment to the ultimate takers of the property of the estate was at the death of the last survivor of the beneficiaries of the trust for whom annuities were provided. If that time may possibly be more than 21 years after the death of the testatrix, it is too remote for the gift over to be valid. * * * The improbability of its occurrence after the prescribed time is immaterial. If it can possibly happen after that time, an interest conditioned upon it is too remote. Gray's Rule Against Perpetuities, Sec. 214; Tiffany on Real Prop., Sec. 180.'

"In Oklahoma, the rule is stated in *In re Walker's Estate,* 179 Okl. 442, 66 P. (2d) 88, 95, as follows:

'Stated broadly, the rule against perpetuities is that executory limitations are void unless they take effect, of necessity, and in all possible contingencies, within the period of a life or lives in being at the death of the testator, and twenty-one years thereafter. An estate to vest in the future, which may possibly not vest until after the expiration of a life or lives in being, plus twenty-one years, could not validly exist, and an instrument attempting such purpose would be invalid, for it would be in violation of the rule. Sections 11759, 11756, O. S. 1931 (60 Okla. Stat. Ann., Sec. 34, 31). *Phillips* v. *Chambers,* 174 Okl. 407, 51 P. (2d) 303.'

"The provision of the will here, as to duration of the trust, is quoted at page 39, above. Suppose, for example, that, after death of testator, a child has been born to and survived Claire Marie, and that such child was, say one month of age at the death of Claire Marie. By the terms of the will, the trust, in such circumstances, would continue until such child arrived at the age of

35 years. Obviously, that is for a period of the life of a person in being and for 34 years and 11 months thereafter; hence, if the provisions of the will are such that the devise to Claire Marie is dependent on the trust then the devise is void. Claire Marie would not take as a contingent remainderman; she would not take at all.

"But we do not think it can successfully be argued that the devise to Claire Marie is dependent on the trust. By the fifth section of the will there is a devise 'in kind' of six and sixty-six hundredths plus interest to Claire Marie. Then, by subsequent provisions of the will, such interest is impressed with a trust—the vesting of the estate was not delayed, but merely its possession and enjoyment. We think it clear that the interest vested in Claire Marie in the first instance and that such vesting was not dependent on the trust.

"The rule against perpetuities is directed to the vesting of the interest and not to its possession and enjoyment. *McClary* v. *McClary,* (C. C. A. 10) 134 F. (2d) 455. If, as we believe, the devise to Claire Marie was not dependent on the trust, then it was not violative of the rule against perpetuities.

"• • • • • • • •"

In the petition for rehearing filed in the Circuit Court of Appeals, the following statement (p. 16) as to the "rule against perpetuities" was all that was said upon the subject, *viz.*:

"• • • • • • • •

"Additionally, it must be remembered that in Oklahoma the rule against perpetuities is that 'an estate to vest in the future, which may *possibly* not vest until after the expiration of a life or lives in being, plus twenty-one years, could not validly exist, and an instrument attempting such purpose would be invalid for it would be in violation of the rule.' *In re Walker's Estate,* 66 P. (2d) 88, 95. Looking now to the provisions of sub-

division sixth of the Champlin will, whereby the trust was to continue until Claire Marie reached the age of 35 years and in the event she died before reaching that age 'leaving lineal descendants, then I further direct that these trusteeships continue until such lineal descendants arrive at the age of thirty-five (35) years.' Suppose, now, by way of illustration, that Claire Marie had died in child-birth and left surviving a lineal descendant born at the time of her death. By the terms of the will the trust, in such circumstances, would continue until such child arrived at the age of thirty-five years. Obviously, that shows an attempt to create a trust which may *possibly* continue for the life of a person in being and for thirty-five years thereafter. If then, *as has now been held in this case,* the provisions creating the trust are such as to prevent vesting of the estate in the devisees until the termination of that trust, then indubitably, subdivision sixth was and is void as being in violation of the rule against perpetuities. Eliminate the sixth subdivision, as it must be eliminated under the above reasoning—reasoning which is founded on the holding of the court herein—and there is left the fifth subdivision which clearly and distinctly makes an absolute devise to Claire Marie, and the seventh subdivision the meaning of which this court deemed to be so obscure and uncertain as to be made evidence only by the consideration of the oral declarations of the testator as to his meaning. Eliminate such oral declarations of the testator—as we have shown they must be eliminated—and there is left the seventh subdivision with its unascertained obscure and uncertain meaning, and, by the specific admonition of Section 156, *supra,* the clear and distinct absolute devise made in subdivision fifth cannot be affected by the uncertain provisions of the seventh subdivision."